No. 01-550

Supreme Court, U.S.
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In The

Supreme Court of the United States

SUBMERSIBLE SYSTEMS, INC.,

Petitioner,

versus

PERFORADORA CENTRAL, S.A. de C.V.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

The parent corporation of respondent, Perforadora Central, S.A. de C.V., is Grupo Industrial Atlantida, S.A. de C.V., a corporation organized and existing under the laws of Mexico. Neither respondent nor its parent is publicly held and no publicly held company owns any of either corporations' stock.

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COUNTER-STATEMENT OF THE FACTS OF THE CASE AND PROCEEDING

This lawsuit arises out of the alleged detention[1] in a Mexican port by a Mexican company, Perforadora Central, S.A. de C.V. ("respondent" or "Central"), of equipment used in the inspection of submerged oilfield pipelines in Mexico for Petroleos Mexicanos ("Pemex"), the Mexican national oil company. Submersible Systems, Inc. ("petitioner"or "SSI") had subcontracted with a Mexican company to provide the inspection equipment and personnel for operations in Mexico.

SSI entered into a contract with a Mexican engineering company ("Quantum") for pipeline inspection services in Mexico. Quantum disappeared owing SSI $720,000 and abandoned SSI's inspection equipment on board Central's vessel in the Mexican port of Dos Bocas. Central, also owed money by Quantum, filed a criminal complaint against Quantum for fraud in the State of Campeche, Mexico, and submitted the equipment to the local Ministerio Publico[2] and filed a claim to recover its costs of removing the equipment from the vessel. SSI

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[1] Central disputed many of the facts found by the district court, and even some of those accepted by the Fifth Circuit. Central continues to deny these contentions. For purposes of this writ application, however, these facts are accepted as so.

[2] The Ministerio Publico is akin to a district attorney who under Mexican law, is the appropriate depository for abandoned or disputed property and of all evidence in criminal matters. Both parties' Mexican law experts testified that turning the property over to the Ministerio Publico was proper and under Mexican law would terminate any further liability.

retained an attorney who appeared in these Mexican proceedings, made one attempt to retrieve its equipment but made no claims for damages in the criminal proceedings although it could have under Mexican law and practice.[3]

Dissatisfied with its results in Mexican proceedings, SSI searched for Central's property in the U.S. Discovering a marine drilling rig being constructed for Central, SSI telephoned the Halter Marine Shipyard in Pascagoula, Mississippi to confirm the presence of Central's property. SSI sought attachment of property pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Rule B").[4] But the court held SSI and its attorneys failed to diligently search for an officer or employee located at the construction site. Despite finding that SSI called the Mississippi Secretary of State and searched the phone directory [A-34, A-35], the district court held that if SSI had diligently searched it would have found Central's temporary office and construction supervisor at the Halter shipyard. [A-36]. The district court also found that SSI had failed to file the necessary Rule B affidavit (regarding diligent efforts) into the record. [A-35].

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[3] The district court in Mississippi repeatedly attempted to evaluate the actions and events in Mexico according to Mexican law but refused to apply Mexican law to this litigation. Punitive damages are prohibited under Mexican law.

[4] *See* full text of Rule B in the appendix annexed hereto, at A-121-125. Cites to the appendix annexed to SSI's writ petition are to A-1 through A-119. Cites to respondent's appendix are to A-120 through A-125.

No writ of attachment was ever authorized or issued, despite three separate applications by SSI (none of which was accompanied by a duplicate or substituted affidavit). Therefore, no jurisdiction ever vested under Rule B.[5] The district court exercised personal jurisdiction over Central pursuant to the Mississippi long-arm statute, holding that the presence, at the time of the attempted attachment of a mobile offshore drilling rig under construction, a temporary office at the Halter shipyard, and three construction supervisors constituted minimum contacts sufficient to satisfy the Fourteenth Amendment. Although the district court's denial of SSI's Rule B application was an appealable final order, SSI did not appeal the district court's ruling.

The case was tried from June 14, 1999 to June 16, 1999, with most of the testimony on liability submitted by depositions. The deposition witnesses were Mexican nationals who were deposed, most with the aid of translators, in Mexico. By Order dated July 19, 1999, the district court awarded SSI actual damages of $289,734.62, pre-judgment interest of $48,211.84, consequential damages of $106,520.50, lost profits of $2,311,140 and punitive damages of $1,500,000.

Central moved for a new trial and for an order to take additional depositions, based on the surprise testimony at trial of Wolfgang Burnside,[6] SSI's President, and

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[5] SSI also failed to perfect an attachment under Mississippi law.

[6] Burnside testified SSI had a one year contract in Mexico with a company named Oceatech which SSI was unable to perform due to Central's alleged actions. The lost profit

because the captain of the vessel involved in the events at issue had been located in Chile.[7] The district court denied the motion six months after it had been filed and after the captain had once again gone out to sea.

After the denial of post-trial motions, Central appealed.[8] The Fifth Circuit vacated the district court's judgment and remanded with instructions to dismiss, holding that Central's contacts with Mississippi and the U.S. were insufficient to subject Central to general personal jurisdiction. The Fifth Circuit also held that the district court did not err in refusing to exercise jurisdiction under Rule B on the basis of SSI's failure to diligently

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calculations of SSI's economist included this contract. Central submitted Oceatech's affidavit refuting the granting of a contract.

[7] The captain was located when his ship came in to dry dock after an extended two year fishing trip and submitted an affidavit to refute the testimony of SSI's witness – Carlisle – who testified at deposition that he was not certain who ordered the alleged "seizure" of property but at trial, when it was clear the captain would not be present, testified that he was ***certain*** it was the captain. Based solely on the captain's affidavit, the district court found that he lacked credibility.

[8] Central argued on appeal that it was (1) not subject to personal jurisdiction in Mississippi, (2) there was no admiralty jurisdiction, (3) the district court should have dismissed the case on the grounds of *forum non conveniens*, (4) the district court should have applied Mexican law to the case, (5) the district court erred in various respects regarding its calculations of damages, and (6) the district court should have granted Central a new trial. Points 3-6 were not discussed in the appellate decision and would have to be dealt with on remand in the event of reversal.

search for Central and to file the necessary Rule B affidavit.

Only after the Fifth Circuit issued its opinion and after the rig had left Mississippi did SSI write to District Judge Gex requesting that he search the work file of originally recused District Judge Russel, where the missing affidavit was reportedly found. SSI petitioned for panel rehearing and for rehearing *en banc* arguing: the Fifth Circuit's decision makes all foreign defendants immune from attachment under Rule B; failure to file the Rule B affidavit in the record was due to the district court's clerical error; and assertion of general personal jurisdiction was appropriate. The Fifth Circuit also made the missing affidavit part of the record, but denied SSI's petition for panel rehearing, finding no jurisdiction under Rule B had ever vested since no process of attachment had been ordered, issued or served on the property and the property was no longer within the district. That Court further found no basis for disturbing the panel's ruling on personal jurisdiction and denied *en banc* rehearing, no judge having requested a poll of the circuit judges. Pursuant to the Fifth Circuit's mandate, the district court dismissed the case and canceled the appeal bond.

REASONS FOR DENYING THE WRIT

I. THE PETITIONER DOES NOT POINT OUT ANY MISSTATEMENT OF THE LAW BY THE FIFTH CIRCUIT BUT DISPUTES THE FACTS AS FOUND BY THE DISTRICT COURT IN REFUSING THE RULE B ATTACHMENT AND AS FOUND BY THE FIFTH CIRCUIT IN FINDING NO GENERAL PERSONAL JURISDICTION.

The panel opinion, denial of rehearing and denial of rehearing *en banc* by the Fifth Circuit present no issues that warrant the exercise of the Court's discretionary power of review. No federal law or precedent, maritime or otherwise, was misstated by the Fifth Circuit. The decision below will not impact the uniformity of federal law or any aspects of traditional admiralty practice, procedure or jurisdiction. While SSI would have this Court believe that the Fifth Circuit's decision does away with Rule B seizures, it effects no change in law or practice. SSI has not directed the Court to any conflicting decisions of the appellate courts or to any misstatement of law which would have far reaching consequences of general applicability to the public. SSI's arguments go to the unique facts of this case as they relate to SSI's failed attachment under Rule B and to its failed assertion of personal jurisdiction over Central – not to any claimed mistake of the law.

The Fifth Circuit reviewed the district court's denial of SSI's request for a writ of attachment pursuant to Rule

B for clear error.[9] Applying the very same legal precedents contained in SSI's writ application, the Fifth Circuit concluded that it was not clear error for the district court to apply Rule B ***as written*** and refuse to attach Central's property because SSI had failed to file the affidavit required by Rule B. The Fifth Circuit confirmed that the affidavit served the purpose of assuring the district court of SSI's diligence in looking for Central before invoking Rule B. The Fifth Circuit's finding of no clear error was consistent with the district court's finding, as a matter of fact, that SSI did not act diligently before seeking a Rule B attachment. If SSI disagreed with the factual findings of the district court and its refusal to issue a writ of attachment under Rule B, it had an immediate right to appeal the issue to the Fifth Circuit at the time.[10] The record does not reflect any contemporaneous efforts by SSI to find the "missing" affidavit or to replace it.

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[9] *See McAllister v. United States*, 348 U.S. 19, 20, 75 S.Ct. 6, 99 L.Ed. 20 (1954); and Rule 52(a) Fed.R.Civ.P.

[10] An order denying a warrant of arrest or writ of attachment as well as those vacating earlier arrests or attachments are appealable as final. *See Maryland Tuna Corp. v. M/S BENARES*, 429 F.2d 307, 317 (2d Cir. 1970); *Chilean Line, Inc. v. United States*, 344 F.2d 757, 759 (2d Cir. 1965); *see also* 29 *Moore's Federal Practice* § 710.04[2][a] (3d Ed. 1997). The collateral order doctrine announced in *Cohen v. Beneficial Ind. U.S. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), also supports the right to an immediate appeal of a denial or vacation of an attachment. *See Swift & Co. v. Compania Colombiana del Caride*, 339 U.S. 684, 688-9, 70 S.Ct. 861, 94 L.Ed. 1206 (1950).

The Fifth Circuit reviewed, *de novo*,[11] the district court's findings regarding Central's contacts with the forum and determined that the district court's assertion of general personal jurisdiction over Central based on the Mississippi long-arm statute and limited contacts with the State of Mississippi under the facts of the case did not comport with the Fourteenth Amendment. Citing the consistent case law of the circuits and this Court and the service provisions of Rule 4(k)(2)[12] of the Federal Rules of Civil Procedure, the Fifth Circuit also found, on the facts of record, that Central's limited contacts with the United States as a whole, which were exclusively the result of Central's business operations in Mexico, were not sufficient to permit the district court to exercise general personal jurisdiction consistently with the requirements of the Fifth Amendment. Even if these facts had been wrongly determined by the Fifth Circuit, its decision certainly does not change the law or represent a departure from settled judicial practice. It does not, therefore, provide a proper subject for *certiorari*, as review by the Court would impact only the litigants involved in this case.

The facts of this case are key to evaluating SSI's petition for review: the required Rule B affidavit was not in the record when the judge evaluated the Rule B application; SSI failed to diligently search for Central; SSI failed to appeal those factual findings at the time although it had a right to do so; for those reasons an

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[11] *World Tank Carriers Corp. v. M/V YA MAWLAYA*, 99 F.3d 717, 720 (5th Cir. 1996); *see also* A-104.

[12] *See* text of Rule 4(k)(2) at A-123.

attachment never occurred; Central's sporadic contacts with the forum were of small consequence, were unrelated to the alleged maritime tort and resulted from operations in Mexico; and these facts became the deciding factors after it was determined that no attachment or seizure had occurred. Because they have not questioned any of the law applied by the Fifth Circuit, the petitioners necessarily come to this Court seeking the reversal of fact-findings.

This Court has long held it "do[es] not grant a certiorari to review evidence and discuss particular facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925),[13] for:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a ***real and embarrassing conflict of opinion*** and authority between the circuit courts of appeal.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 43 S.Ct. 422, 423, 76 L.Ed. 712 (1923).[14] This case is an inappropriate vehicle for the consideration of any of the questions presented by the petition.

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[13] *See also N.L.R.B. v. Hendrix County, Elec.*, 454 U.S. 170, 177 n. 8, 102 S.Ct. 216, 222, 70 L.Ed.2d 323, 330 (1981).

[14] *See also Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J. concurring); and *Ponte v. Real*, 471 U.S. 491, 501-502 (1985) (Stevens, J. concurring). Furthermore, this Court rarely grants certiorari when the error at issue consists of the misapplication of a properly stated rule of law. Supreme Court Rule 10.

II. NEITHER THE RECORD NOR THE FIFTH CIRCUIT DECISION RAISES THE QUESTIONS PRESENTED BY THE PETITION.

The case below involved two basic questions: (1) was the exercise of general personal jurisdiction over the defendant constitutional; and (2) did the district court clearly err in failing to issue a writ of attachment under Rule B? The Fifth Circuit answered both of these questions in the negative, relying on the facts of the record relating to Central's contacts with the forum and to the district court's lack of assurance of SSI's diligence prior to seeking a Rule B attachment.

The questions presented by petitioner focus on (1) an agreed order that SSI says established *quasi in rem* jurisdiction under Rule B – a jurisdictional basis the district court expressly rejected; (2) a purported stipulation conceding jurisdiction that was never made, has no support under the law, and was not relied on by the district court; and (3) a suggested misinterpretation by the Fifth Circuit of the law applicable to the proper assertion of general personal jurisdiction.

The petitioner did not raise the issue of the agreed order until it petitioned the Fifth Circuit for a panel rehearing. As to the petitioner's second question presented, the record does not indicate any stipulation to or concession of personal jurisdiction by Central. Indeed, in every instance that SSI has offered as evidence of a concession, Central specifically and expressly reserved its right to contest both personal jurisdiction and jurisdiction by attachment under Rule B. The Fifth Circuit's decision reflects no misreading or misunderstanding of Rule

4(k)(2) or the case law applicable to general personal jurisdiction. Thus, the implied confusion expressed in petitioner's third question presented is likewise not raised by the decision below.

In fact, the Fifth Circuit's opinion is much less complex and far reaching than SSI makes it out to be. The panel held, simply, that Central is a Mexican company operating from Mexico City, Mexico. The few contacts Central has with the United States result from those operations in Mexico and are an insufficient basis for the assertion of general personal jurisdiction. The Fifth Circuit further held that the district court did not err in refusing to grant a Rule B attachment and that *quasi in rem* jurisdiction never vested pursuant to Rule B. Those holdings were proper in all respects and do not call for review by the Court.

III. THE DECISION BELOW WAS CORRECT.

A. In this case, the district court never exercised *quasi in rem* jurisdiction under Rule B.

In this case, the district court determined that the conditions set forth in Rule B[15] were not met and refused to authorize attachment. On three separate occasions, SSI renewed its request for an attachment pursuant to Rule B. Each time, the district court refused to issue an order.

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[15] *See* Rule B(1), " . . . if the defendant shall not be found within the district . . . the verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue." [A-123, 124]

Only by issuance of a writ of attachment and subsequent seizure or attachment of property does jurisdiction under Rule B vest.[16]

SSI's argument that attachment of Central's property was unnecessary for jurisdiction to vest under Rule B is simply not accurate.[17] While it is true that *Republic National Bank of Miami*, and *THE BRIG ANN*, held that it is not necessary for the *res* to be within the district court's possession when a judgment is rendered, those cases specifically hold that jurisdiction must first vest with the

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[16] *See THE RIO GRANDE*, 90 U.S. (23 Wall.) 458, 463, 23 L.Ed. 158 (1875) ("when the vessel was seized by the order of the court and brought within its control the jurisdiction was complete."); *Republic National Bank of Miami v. United States*, 506 U.S. 80, 84, 113 S.Ct. 554, 557, 121 L.Ed.2d 474 (1992) ("valid seizure of the res is a prerequisite . . . "); *THE BRIG ANN*, 13 U.S. 289, 290, 3 L.Ed. 734 (1815) (" . . . it is necessary that the thing should be actually or constructively within the reach of the court. It is actually within its possession when it is submitted to the process of the court; it is constructively so, when, ***by a seizure***, it is held to ascertain and enforce a right of forfeiture . . . "). Process was issued and attachment or seizure occurred in all of the following cases previously relied on by SSI: *Sembawang Shipyard, Ltd. v. Charger, Inc.*, 955 F.2d 983, 985 (5th Cir. 1992); *Great Prize v. Mariner Shipping Pty., Ltd.*, 967 F.2d 157, 159 (5th Cir. 1992); *Swift & Co. Packers v. Compania Colombiana del Caribe*, 175 F.2d 513, 514 (5th Cir. 1949); *Heidmar, Inc. v. Anomina Ravennate di Armamento, Sp.A.*, 132 F.3d 264, 266 (5th Cir. 1998); *THE MERINO*, 22 U.S. 391, 6 L.Ed. 118, 120 (1824); and *THE ROSALIE M.*, 12 F.2d 970, 971 (5th Cir. 1926).

[17] SSI loosely uses the terms "formal," "constructive," and "physical" with reference to the attachment necessary to obtain jurisdiction over Rule B. Central submits that, at a minimum, an order authorizing the issuance of process of attachment is necessary.

district court by issuance of a writ of attachment and attachment of property.[18] This Court, in *Republic National Bank of Miami* expressly stated "certainly, it long has been understood that a valid seizure of the *res* is a pre-requisite . . . . " *Republic National Bank of Miami*, 506 U.S. at 87. Fairly read, *Republic National Bank of Miami* and *THE BRIG ANN* stand for the proposition that once jurisdiction is vested in the district court by virtue of issuance of process of attachment and subsequent attachment of property, removal of the property from the district court's possession will not divest the district court of jurisdiction. But here, the district court never authorized or issued process of attachment and no such process was ever served.

SSI cites no case to support the proposition that a district court can exercise *quasi in rem* jurisdiction under Rule B without the issuance of process of attachment. The cases SSI does cite support the Fifth Circuit's opinion. SSI offers *Miller v. U.S.*, as evidence of admiralty practice "in a traditional maritime setting." But *Miller* involved the confiscation of shares of stock of a confederate citizen and held that issuance of a writ of attachment or warrant of arrest are necessary ~~for juris~~diction to vest, stating: *"in revenue and admiralty cases a seizure is undoubtedly necessary to confer upon the court jurisdiction over the thing when the proceeding is in rem,"* and *" . . . that the writ was larger. It commanded him [the Marshal] to hold the property, it having*

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[18] *THE BRIG ANN*, 13 U.S. at 290; *see also Stevedoring Services of America v. Ancora Transport*, 59 F.3d 879, 881 (9th Cir. 1995).

been duly seized; and he returned a seizure."[19] Similarly, a warrant of arrest *in rem* issued in *U.S. v. James Daniel Good Real Property* and this Court made it clear that beyond the issuance of the warrant, physical seizure would be unnecessary, in that forfeituere, case because the immovable nature of the property in itself preserved the court's jurisdiction.[20]

SSI cites various cases in which jurisdiction vested in the district court as a result of vessel release bonds, filing of claims to the property without restricting appearance, and stipulations or letters of undertaking in which defendants voluntarily submitted themselves to jurisdiction, "as if his vessel or property had been seized."[21] Central

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[19] *Miller v. U.S.*, 78 U.S. (11 Wall.) 268, 294-5 (1871). Furthermore, the "control" and "notice" referred to in SSI's selected quotation, in context, referred to the court's control over the shares by the Marshal's seizure and notice to the world of the seizure. *Id.* While SSI argues that the agreed order in this case accomplishes the same thing, the order actually postponed any attempt by the court to issue process of attachment, gave no notification to anyone of an arrest or attachment, and reserved all rights which either party may have had. See pp. 15-16, *infra*.

[20] 510 U.S. 43, 47, 57, 114 S.Ct. 482, 497, 503 (1993). In the present case, the district court never issued any authorization of attachment or seizure. Unlike the immovables in *James Daniel*, the rig was capable of movement once complete, and now has left the district and is no longer owned by the defendant.

[21] *Continental Grain Company v. Federal Barge Lines, Inc.*, 268 F.2d 240, 242, 244 n. 3 (5th Cir. 1959); *Panaconti Shipping Co., S.A. v. M/V YPAPANTI*, 865 F.2d 705, 707-8 (5th Cir. 1989); *Cactus Pipe and Supply Co. v. M/V MONTMARTRE*, 756 F.2d 1103, 1107 (5th Cir. 1985); *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 38, 80 S.Ct. 1470, 1481 (Whittaker, J. dissenting) ("this court has from an early day, consistently held that a bond, given to

never had to obtain a vessel release bond or security in lieu of attachment and offered no stipulation or similar undertaking in this case.

Throughout the appeal of this matter, SSI has made reference to Central's posting of an appeal bond after judgment, implying that somehow this bond can substitute for the attachment of property under Rule B. The filing of an ordinary supersedeas bond to stay an in personam judgment does no act to vest jurisdiction in the district court under Rule B and contains no stipulation similar to those which gave jurisdiction to the courts in *Continental* or *Panaconti, supra,* note 21.

SSI argues an agreed order,[22] signed by the parties specifically to postpone a hearing on SSI's motion for the issuance of process of attachment, established *quasi in rem* jurisdiction in the district court. The agreed order is clearly not a writ of attachment and contains no stipulations or undertakings by Central which could be construed as a submission to the court's jurisdiction. Quite the opposite, Central fully reserved its rights "to contest

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prevent the arrest or procure the release of the vessel, is substituted for and stands as the vessel in the custody of the court"); *see also J. K. Welding Co. v. Gotham Marine Corp.*, 47 F.2d 332, 335 (D.C.N.Y. 1931) ("the stipulation for value alone is sufficient to give jurisdiction to a court because its legal effect is the same as the presence of the *res* in the court's custody . . . "); and generally, Harmon, *Discharge and Waiver of Maritime Liens*, 47 Tul. L. Rev. 786 (1973).

[22] Despite heavy reliance on this document, SSI has not included the order in its Rule 14.1(i) appendix. Respondent attaches the agreed order, hereto, as a supplement to the appendix, pages A-120 through A-122.

jurisdiction and venue, to assert *forum non conveniens* . . . to object to the power and authority of the court to restrain, enjoin, or prohibit the movement, sale, transfer or disposition of the rig . . . . " SSI clearly recognized this agreed order did not constitute a Rule B attachment or the assertion of jurisdiction thereunder by the district court, having executed the order "with full reservation of the rights of Submersible Systems, Inc. to seek the Rule B or other attachment of the rig or other property belonging to Perforadora Central, S.A. de C.V."[23] In the face of the district court's repeated refusal to issue a writ of attachment under Rule B in this case, this agreed order is clearly not the issuance of process of attachment and did not serve to establish a jurisdiction the district court never intended to exercise.

SSI asserts that upholding the Fifth Circuit's decision in this case would multiply the cost, time and inconvenience to litigants, counsel, ships, clerks, marshals, keepers and court personnel by requiring emergency or interlocutory appeals. The district court's refusal to issue a writ of attachment pursuant to Rule B occurred early on in this case. That decision was appealable as final by SSI at the time.[24] SSI chose not to exercise that right at a time when the property was still in the district. SSI chose not to take issue with the district court's factual findings as to

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[23] *Id.* at A-120.

[24] Temporal finality has always given way to effective finality in admiralty cases involving a *res* precisely because a disposition of the *res* can have the effect of putting the property beyond the power of certain recovery. *See* discussion in 29 *Moore's Federal Practice* § 710.01[1-2] (3d Ed. 1997).

Rule B until after a trial on the merits and subsequent appeal by Central. The record does not reflect any effort by SSI to locate the missing affidavit which is specifically required by Rule B(1)(a) or to provide a substitute, until after the Fifth Circuit's panel opinion. Any inconvenience and waste of time and money was occasioned by SSI's own delay in exercising its rights, not by the decision of the Fifth Circuit.

SSI's invitation to this Court to establish *quasi in rem* jurisdiction under Rule B over property for which the district court never authorized the issuance of process of attachment, property which is no longer in the geographical boundaries of the district court and which is no longer owned by the defendant, must be declined. To do otherwise, would change long standing admiralty practice and render the text of Rule B meaningless.

B. The decision below correctly stated the law and determined from the facts of record that, in this case, Central's contacts with the United States did not give the district court authority to assert general personal jurisdiction over Central.

1. No systematic and continuous contacts.

In conducting its *de novo* review of the issue, the Fifth Circuit's opinion contained a thorough and accurate explication of the law pertaining to the assertion of general personal jurisdiction over a foreign non-resident. The Fifth Circuit accurately stated the law contained in this Court's opinions and those of the various courts of appeal and addressed the impact of Federal Rule of Civil Procedure 4(k)(2)'s service provisions.

SSI implies in its presentation of the issue, that the decision below somehow confused the jurisdictional requirements of Rule 4(k)(2) and standards for exercising general personal jurisdiction pronounced by this Court. Rule 4(k)(2) does not supply the standard by which an assertion of jurisdiction is judged. As stated by the rule itself, it is the Constitution, in this case the Fifth Amendment, which supplies that standard. Rule 4(k)(2), as the service provision, is but one aspect of the jurisdictional inquiry. The rule's service provisions neither broaden nor narrow Constitutional requirements.

What satisfies the "minimum contacts" test is necessarily a factual case by case inquiry.[25] When a district court seeks to assert general, as opposed to specific, personal jurisdiction over a foreign non-resident, the contacts required are very substantial. The decision below correctly pointed out that general personal jurisdiction is very difficult to obtain and requires a high level of systematic and continuous contacts.[26] As was the case in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[27] Central's

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[25] *See Perkins v. Benguet Consolidated Mining Co., et al.*, 342 U.S. 437, 445, 72 S.Ct. 413, 418, 96 L.Ed. 485 (1952) ("the amount and kind of activity which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case.")

[26] *See Wilson v. Belin*, 20 F.3d 644, 650 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 322 (1994); *Jones v. Petty-Ray Geophysical, Geo Source, Inc.*, 954 F.2d 1061, 1068 (5th Cir. 1992), *cert. denied*, 506 U.S. 867 (1992).

[27] 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); *see also* appendix at A-107, 108.

few contacts with the United States resulted exclusively from their business operations in Mexico. What SSI seeks from this Court is a substitution of SSI's factual analysis for that of the Fifth Circuit.[28] Only once has this Court upheld an exercise of general personal jurisdiction when the suit was unrelated to the defendant's contact with the forum. *See* 16 *Moore's Federal Practice* § 108.4[3] (3d Ed. 1997) and *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952).[29]

This case does not arise out of any of Central's contacts with the United States. It must also be kept in mind this case involves not the competing jurisdictional interest of states over which the federal government is sovereign, but the competing interest of coequal sovereign nations. The assertion of jurisdiction by the district court

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[28] SSI attempts, at page 23, to distinguish *Helicopteros* by stating "*Helicopteros* was not a Rule 4(k)(2) case." If SSI believes the jurisdictional inquiry under Rule 4(k)(2) is no different than the minimum contacts inquiry, why then is Rule 4(k)(2) a basis for distinguishing the case? This statement confirms that SSI's question presented is a non-issue.

[29] In *Perkins*, relied on in *Helicoptoros* and *Wilson, supra*, the defendant carried out essentially all of its general business activities from Ohio throughout the Japanese occupation of the Philipines during World War II. The quote by SSI [*see* writ application p. 23] from *Perkins*, implying that even if Central had only a limited amount of contact with the U.S., it would still be subject to general personal jurisdiction, is misleading. The "but limited" portion of SSI's quotation of *Perkins*, in context, refers to the fact that the defendant's overall business had been limited due to the Japanese occupation. The defendant in *Perkins* had, in fact, set up shop in Ohio.

presented substantial conflicts with the sovereignty of Mexico.[30] At the time SSI instituted this suit, related Mexican proceedings had been under way for approximately eleven (11) months. To the extent that Mexican law should have applied to events occurring wholly in Mexican territory, the U.S. had no interest in hearing this case.[31] More than "substantial" or even "extensive" contacts with the U.S. are required. *See Amoco Egypt Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851 n.3 852 (9th Cir. 1993) (in a suit for damages caused by a ship collision, the Ninth Circuit held "[W]e regularly have declined to find general jurisdiction even when contacts were quite extensive . . . where, as here, the defendant is from a foreign nation rather than another state, the sovereignty barrier is high and undermines the reasonableness of personal jurisdiction.")

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[30] The government of Mexico, through its Secretary of Foreign Affairs, made an appearance before the Fifth Circuit and filed an amicus brief opposing the decision of the district court. The Secretary of Foreign Affairs has chosen not to move for leave to present argument before this Court at this procedural juncture.

[31] *See Reich v. Signal Oil and Gas Co.*, 409 F.Supp. 846, 851 (S.D. Tx. 1974) (recognizing that Texas had no special interest in granting relief to its own citizens against a foreign corporation on a cause of action that arose under the laws of a foreign government for conduct outside of the United States). In its analysis of Central's contacts with the United States, the Fifth Circuit properly considered both that SSI's claims had nothing to do with Central's contacts with the United States and the events giving rise to those claims occurred exclusively in Mexico; *see* appendix at A-109, 110.

The Fifth Circuit correctly set forth the law applicable and found the district court's assertion of general personal jurisdiction inconsistent with the Fifth and Fourteenth Amendments. Rather than point to any misstatement of the law by the Fifth Circuit or any conflicts among the circuits, SSI simply seeks to substitute its own conclusions as to the facts of record regarding U.S. contacts.[32]

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[32] SSI fails to mention that most of the contacts to which it alleges were related to the rig construction project in Mississippi and no longer exist, i.e., they were temporary. The office of the shipyard closed when the construction project ended and its supervisory employees returned to Mexico. Central no longer owns the property in question. By way of clarification, Central's contact with the U.S. referred to in paragraph 2 on page 21 of the writ petition was solely at the direction of Quantum which chartered Central's vessel in Mexico. The joint venture referred to in paragraph 4 of the writ petition was conducted wholly in Mexico. The inland drilling rigs referred to in paragraph 5 are chartered to an independent third party and are not subject to Central's control under the charter. The charter calls for delivery and redelivery of the rigs on the Gonzalez River in Mexico. The funds and equipment to which SSI points are all related to Central's marine drilling operations in Mexico. In footnote 10 on page 21 of the writ petition, SSI cites *Engineering Equipment Co. v. SS SELENE*, 446 F.Supp. 706, 709-10. (S.D.N.Y. 1978), for the proposition that loading cargo in the United States alone is sufficient to confer specific jurisdiction. The issue at hand is the assertion of general personal jurisdiction not jurisdiction based upon contacts out of which claims arise.

2. No waiver of the right to contest personal jurisdiction

SSI cites various cases[33] for the proposition that even a non-resident that lacks minimum contact may stipulate and concede personal jurisdiction. Central took every procedural step required by law to raise the defense and preserved it repeatedly. Central made a limited appearance under Rule E(8) of the Supplemental Rules for Certain Admiralty and Maritime Claims[34] and complied with the requirements of Rule 12(h) of the Federal Rules of Civil Procedure.[35] The only factual assertions made by Central were that its rig construction project, including an office and three supervisory employees at the Halter Shipyard were present in the southern district of Mississippi at the time SSI sought a Rule B attachment. Contrary to the assertion of SSI (*see* SSI's writ application at pp. 17-18), this is not a judicial

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[33] *See* SSI's writ application at p. 17 *citing Insurance Corp. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694 (1982) (waiver for failure to comply with discovery regarding the jurisdictional issue); *Petrowski v. Hawkeye Security Co.*, 350 U.S. 495 (1956) (formal executed stipulation to jurisdiction); and *Ruhrgas Ag v. Marathon Oil Company*, 526 U.S. 574 (1999) (no holding regarding waiver).

[34] Rule E(8) allows a defendant to make a limited appearance without subjecting itself to in personam jurisdiction.

[35] Defenses such as lack of personal jurisdiction are properly raised by motion or responsive pleading. *See* Rule 12(h) Federal Rules of Civil Procedure and *United States v. MARUNAKA MARU No. 88*, 559 F.Supp. 1365, 1371 (D. Alaska 1983), cited at p. 13 of SSI's writ application.

admission which waives the right to challenge the exercise of personal jurisdiction when that right has been clearly and repeatedly preserved. A judicial admission is a formal *factual* concession or stipulation that is made intentionally as a waiver.[36] While Central's assertions as to the presence of the construction project, office and employees in the southern district of Mississippi establish those facts, those facts alone,[37] as decided by the Fifth Circuit, were insufficient to assert jurisdiction and were neither intended to nor were interpreted as a waiver of the right to challenge personal jurisdiction. Neither the district court nor SSI treated this as a waiver. SSI's counsel continued to vigorously attempt to prove minimum contacts throughout the litigation in the district court and on appeal and the inquiry has expanded after the district court's judgment to include not just contacts in Mississippi but contacts in the entire United States. The district court neither relied on nor found a waiver, but instead conducted its own analysis of the Mississippi long arm statute, minimum contacts and of the facts in the record

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[36] *See Martinez v. Bally's*, 244 F.3d 474, 476 (5th Cir. 2001), *citing McCullough v. Odeco, Inc.*, 1991 WL 99, 413 at *2 (Ed. La. 1991).

[37] SSI cites *Campbell v. Sonat Offshore Drilling Inc.*, 979 F.2d 1115, 1119 (5th Cir. 1992) in support of its position that Central waived its right to contest personal jurisdiction. Yet, the *Campbell* case established only that "**factual** assertions in pleadings . . . are judicial admissions conclusively binding on the party that made them." Yet SSI seeks more than the establishment of facts – it wants a waiver of a legal position – one that Central has clearly not given.

pertinent to the inquiry.[38] An ordinary evidentiary admission made for some independent purpose may be controverted or explained by the parties.[39] As noted above, Central reserved its objections repeatedly.

Central made this ordinary evidentiary assertion regarding the rig construction project and an office and employees related thereto to establish that it had a presence in the district for Rule B(1)(a) purposes but clearly explained at that time and put SSI and the district court on notice in the very same pleadings and by its express reservations throughout the litigation, that it was not thereby conceding the issue of personal jurisdiction outside the context of Rule B attachment. Whatever legal argument Central made, Central never conceded personal jurisdiction.[40] The Fifth Circuit correctly so found.

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[38] *See* 9/25/98 Order: "the Court finds that Perforadora [Central] maintained an office with three employees at Halter Marine in Pascagoula, Mississippi since September of 1997 . . . . The Court finds Perforadora has sufficient contacts with the State of Mississippi to confer personal jurisdiction." Appendix at A-4.

[39] *See Martinez, supra,* 244 F.3d at 477, *citing, McNamara v. Miller,* 269 F.2d 511, 515 (D.C. Cir. 1959); *Keller v. United States,* 58 F.3d 1194, 1199 n.8 (7th Cir. 1995) (quoting John Williams Strong *McCormick on Evidence* § 254 at 142 (1992)).

[40] The meaning of "found within the district" has never been defined and has been left to construction on a case-by-cases basis. *See* Rule B, Advisory Committee Notes, 1966 Adoption of Federal Rules, Subdivision 1.

3. The district court gave two grounds for denying SSI's application for attachment under Rule B.

Central submits that the key fact in this case is that the district court never exercised *quasi in rem* jurisdiction under Rule B and properly stated applicable law in doing so. It is submitted that the factual reasons for the denials are not material. However, because SSI argues that the district court relied on a waiver of personal jurisdiction by Central in denying a Rule B attachment, the district court's alternative bases for denying the attachment warrant discussion. The district court gave two grounds for denying SSI's motion to attach the rig pursuant to Rule B. The district court held that Central could be found within the southern district of Mississippi because its contacts with Mississippi made it subject to jurisdiction there. The district court also held that SSI did not submit the affidavit required by Rule B stating that Central could not be found within the southern district of Mississippi. Although the Fifth Circuit concluded that the district court had erred in finding Central subject to personal jurisdiction, that conclusion does not mean that the district court erred in refusing to attach Central's rig pursuant to Rule B.

In order to secure a writ of attachment pursuant to Rule B, it is a prerequisite that the plaintiff show the defendant "cannot be found in the district."[41] Under Rule

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[41] Jarvis, *An Introduction to Maritime Attachment Practice Under Rule B*, 20 J. Mar. L. & Com. 521, 526-530 (1989); *Western Bulk Carriers v. P.S. International, Ltd.*, 762 F.Supp. 1302, 1306 (S.D. Ohio 1991), *citing*, 7A *Moore's Federal Practice* § B.03 (2d Ed. 1988).

B(1), it is clearly the plaintiff's burden to come forward with information sufficient to justify the attachment order and establish a defendent cannot be found in the district.[42] In order to obtain the district court's authority for issuance and service of a writ of attachment under Rule B, a plaintiff must have made a bona fide effort to determine if the defendant can be found in the district.[43] This is ***not*** a change from traditional admiralty practice. *Moore's* states "it appears that even under former practice the diligence of the plaintiff was often accorded more weight than the diligence of the Marshal.[44] In order to prove a defendant cannot be found in a district, the plaintiff's attorney must submit an affidavit at the time attachment is sought certifying their unsuccessful efforts.[45] If it is shown that diligent efforts were not undertaken, an attachment should be vacated.[46] It is

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[42] *See Unitas Finance Limited v. DiGregario Havegacao, Ltda.*, 1991 WL 33116415, *4 (D.N.J. 1999) and *GEA Power Cooling Systems v. M/V NURNBERG ATLANTIC*, 748 F.Supp. 303, 305 (E.D.Pa. 1990); *See* Advisory Committee notes to Rule B, Subdivision (1).

[43] *See* 29 *Moore's Federal Practice* § 705.04[2][b] at p. 67 (3d Ed. 2000) and cases cited therein; *see also* Panel Opinion at p. 16.

[44] *See*, 7A *Moore's Federal Practice* § B.07 (2d Ed. 1988).

[45] *See* Rule B(1)(a). Because the determination as to whether a defendant cannot be found in the district must be made at the time the complaint is filed or attachment is sought, *see Heidmar, Inc. v. Anonima Ravennate Di Armamento*, 132 F.3d 264, 267 (5th Cir. 1998) and *Western Bulk Carriers*, 762 F.Supp. at 1307, it is necessary that the judge have the benefit of the affidavit at that time.

[46] *See* Jarvis, *supra*, at p. 528, and cases cited therein. Such conduct is also sanctionable. *Id.*

beyond dispute that each time the district court rejected SSI's applications for an attachment, no affidavit as required by Rule B had been filed in the record; no duplicate or substitute affidavit was submitted.

Despite Central's complaint that SSI had made no effort whatsoever to locate Central at the Halter Shipyard, after the district court's refusal to order a Rule B attachment, SSI neither sought to appeal the denial of the Rule B attachment by the district court nor made any inquiries regarding the affidavit.[47] While SSI will undoubtedly argue that its diligence is not the real issue here and the affidavit has now been found, quite clearly, the district court found that the facts before it indicated a lack of diligence on the part of SSI and no affidavit was in the record at the time the Rule B attachment application must be judged.[48] If SSI disagreed with those findings, the remedy was to seek appeal of the district court's final order to the Fifth Circuit. Even if the district court had

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[47] The record and the district court's opinion conclusively establish that SSI failed to make a bona fide effort to find Central. SSI's president, Wolfgang Burnside, stated that he found out Central was having a rig constructed, that he confirmed the information by calling the Halter Shipyard in Pascagoula, but he and his attorneys did nothing to determine if there were offices or employees of Central at the shipyard. The district court specifically found that had SSI diligently searched for Central, SSI would have found Central's office and agents in charge of supervising the rig construction project which SSI sought to attach. [A-4, A-10, A-11, A-36]. The admiralty has never sanctioned attachments under facts such as these. *See International Grain Ceiling Co. v. Dill*, 13 F.Cas. 70 (S.D.N.Y. 1878).

[48] As discussed previously, SSI made no attempt to locate the affidavit until after issuance of the Fifth Circuit's opinion.

held that Central did not have minimum contacts with the southern district of Mississippi, the district court's factual determination as to lack of diligence and lack of the affidavit was sufficient to deny the Rule B application. A contrary holding would make the diligence and affidavit requirements of Rule B completely superfluous. SSI seeks to rewrite the text of Rule B to accommodate the shortcomings of its application and to reverse the denials of the district court that resulted.

SSI argues that the decision below will result in a class-wide immunity to non-resident defendants under Rule B. Yet, the decision below merely confirms the long standing admiralty practice, defined in Rule B, and is limited to situations in which a plaintiff fails to properly file required pleadings including the affidavit, fails to carry its burden of showing diligence, and compounds the situation by failing to appeal the court's final order denying the Rule B attachment. SSI takes issue with application of correctly stated law to the facts, and thus seeks no more than to substitute its own conclusions for those of the district court and Fifth Circuit.

CONCLUSION

For the reasons stated, a writ of certiorari should not be granted to review the proper decision and judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

SUBMERSIBLE SYSTEMS, INC.	*	
	*	**CIVIL ACTION**
versus	*	
	*	**No. 1:98CV251GR**
PERFORADORA CENTRAL,	*	
S.A. de C.V.	*	

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AGREED ORDER

(Filed Sep. 1, 1998)

It is hereby ORDERED that the hearing on the Motion for Preliminary Injunction by plaintiff, Submersible Systems, Inc., previously, scheduled to be heard on June 16, 1998 is postponed by agreement of the parties, subject to being re-scheduled by the Court on motion of either party, on at least 15 days notice.

Perforadora Central, S.A. de C.V. shall give at least 28 days notice of intent to remove or to encumber, sell, transfer or otherwise dispose of the drilling rig now under construction at the yard of Halter Marine, Inc., in Pascagoula, Mississippi, provided that the issuance of this agreed order is with full reservation of the rights of Perforadora Central, S.A. de C.V. to contest jurisdiction and venue, to assert *forum non conveniens*, and with full reservation of the rights of Perforadora Central, S.A. de C.V. to object to the power and authority of the court to restrain, enjoin or prohibit the movement, sale, transfer or disposition of the rig and with full reservation of the rights of Submersible Systems, Inc. to seek the Rule B or

other attachment of the rig or other property belonging to Perforadora Central, S.A. de C.V.

Biloxi, Mississippi, this 27th day of August, 1998.

/s/ Walter J. Gex III
United States District Judge

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RULES INVOLVED IN THIS CASE

I. Rule 4(k)(2) – Federal Rules of Civil Procedure

If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

II. Rule B – Supplemental Rules for Certain Admiralty and Maritime Claims:[1]

Rule B. Attachment and Garnishment: Special Provisions

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the process to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or the plaintiff's attorney that, to the affiant's knowledge, or to

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[1] Rule B was amended effective December 1, 2000. All citations of, and references to, Rule B are to the Rule as written at the time of the events giving rise to the proceedings below.

the best of the affiant's information and belief, the defendant cannot be found within the district. The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and process of attachment and garnishment and the plaintiff shall have the burden on a post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

(2) **Notice to Defendant.** No judgment by default shall be entered except upon proof, which may be by affidavit, (a) that the plaintiff or the garnishee has given notice of the action to the defendant by mailing to the defendant a copy of the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt, or (b) that the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4(d) or (i), or (c) that the plaintiff or the garnishee has made diligent efforts to give notice of the action to the defendant and has been unable to do so.

(3) Answer.

(a) By Garnishee. The garnishee shall serve an answer, together with answers to any interrogatories served with the complaint, within 20 days after service of process upon the garnishee. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in the garnishee's hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against the garnishee. If the garnishee admits any debts, credits, or effects, they shall be held in the garnishee's hands or paid into the registry of the court, and shall be held in either case subject to the further order of the court.

(b) By Defendant. The defendant shall serve an answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.